APPENDIX A

TITLE 28, United States Code, section 1359

§ 1359. Parties collusively joined or made

A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court. June 25, 1948, c. 646, 62 Stat. 935.

APPENDIX B

Civil Action 15623

HOWARD JAMISON, Administrator of the Estate of MARY G. CLARK, deceased, *Plaintiff*

v.

EDWIN S. KAMMERER and WALTER EDELEN, *Defendants*

Certificate and Order

On September 17, 1958, this Court entered its order denying defendants' motion to dismiss plaintiff's complaint for lack of jurisdiction. At the time of the entry of said order, this Court was of the opinion that its order involved a controlling question of law as to which there is substantial ground for difference of opinion. The decisions in this circuit are clear. Nevertheless, a decision in the Eighth Circuit in the case of *Martineau* v. *City of St. Paul*, 172 F. 2d 777, seems opposite to the law in this circuit, and there is no ultimate decision by the Supreme Court directly on this point, and there are a substantial number of cases pending in this court involving the same question, and substantial future litigation seems probable. This Court feels that an immediate appeal from its order denying defendants' motion to dismiss the complaint may materially advance the ultimate termination of this litiga-

tion as well as the ultimate termination of litigation in many other cases. It would further appear that should the court of appeals for this circuit be inclined to review the situation in view of the large number of cases being filed by foreign administrators merely for the purpose of obtaining diversity jurisdiction, and should the defendants prevail then in that event it might work a substantial hardship on many aggrieved parties whose rights might be barred by the applicable statute of limitations in the Commonwealth of Pennsylvania and, therefore, pursuant to Title 28, § 1292 (b) of the United States Code as amended by the Act of September 2, 1958, 85th Congress, H. R. 6238, I do hereby file this certificate and do hereby amend and incorporate this certificate into my original order of September 17, 1958, and make it a part thereof.

s/ JOHN W. McILVAINE
U. S. District Judge

Dated: September 26, 1958

Civil Action No. 15632

HOWARD JAMISON, Administrator of the Estate of THELMA J. GRAHAM, deceased, *Plaintiff*

v.

EDWIN S. KAMMERER and WALTER EDELEN, *Defendants*

Certificate and Order

On September 17, 1958, this Court entered its order denying defendants' motion to dismiss plaintiff's complaint for lack of jurisdiction. At the time of the entry of said order, this Court was of the opinion that its order involved a controlling question of law as to which there is substantial ground for difference of opinion. The decisions

in this circuit are clear. Nevertheless, a decision in the Eighth Circuit in the case of *Martineau* v. *City of St. Paul*, 172 F. 2d 777, seems opposite to the law in this circuit, and there is no ultimate decision by the Supreme Court directly on this point, and there are a substantial number of cases pending in this court involving the same question, and substantial future litigation seems probable. This Court feels that an immediate appeal from its order denying defendants' motion to dismiss the complaint may materially advance the ultimate termination of this litigation as well as the ultimate termination of litigation in many other cases. It would further appear that should the court of appeals for this circuit be inclined to review the situation in view of the large number of cases being filed by foreign administrators merely for the purpose of obtaining diversity jurisdiction, and should the defendants prevail then in that event it might work a substantial hardship on any aggrieved parties whose rights might be barred by the applicable statute of limitations in the Commonwealth of Pennsylvania and, therefore, pursuant to Title 28, § 1292 (b) of the United States Code as amended by the Act of September 2, 1958, 85th Congress, H. R. 6238, I do hereby file this certificate and do hereby amend and incorporate this certificate into my original order of September 17, 1958, and make it a part thereof.

s/ JOHN W. McILVAINE
U. S. District Judge

Dated: September 26, 1958

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 16870

HOWARD JAMISON, Administrator of the Estate of ALFRED WILLIAM FALLON, deceased, *Plaintiff*,

v.

PENNSYLVANIA RAILROAD COMPANY, a Pennsylvania Corporation, ALLEGHENY COUNTY SANITARY AUTHORITY, and UNITED FOUNDATION CORPORATION, a New Jersey Corp., *Defendants*.

Certificate and Order

On September 17, 1958, this Court entered its order denying defendants' motion to dismiss plaintiff's complaint for lack of jurisdiction. At the time of the entry of said order, this Court was of the opinion that its order involved a controlling question of law as to which there is substantial ground for difference of opinion. The decisions in this circuit are clear. Nevertheless, a decision in the Eighth Circuit in the case of *Martineau v. City of St. Paul*, 172 F. 2d 777, seems opposite to the law in this circuit, and there is no ultimate decision by the Supreme Court directly on this point, and there are a substantial number of cases pending in this court involving the same question, and substantial future litigation seems probable. This Court feels that an immediate appeal from its order denying defendants' motion to dismiss the complaint may materially advance the ultimate termination of this litigation as well as the ultimate termination of litigation in many other cases. It would further appear that should the court of appeals for this circuit be inclined to review the situation in view of the large number of cases being filed by foreign administrators merely for the purpose of obtaining diversity jurisdiction, and should the defendants prevail then in that event it might work

a substantial hardship on many aggrieved parties whose rights might be barred by the applicable statute of limitations in the Commonwealth of Pennsylvania and, therefore, pursuant to Title 28, § 1292 (b) of the United States Code as amended by the Act of September 2, 1958, 85th Congress, H. R. 6238, I do hereby file this certificate and do hereby amend and incorporate this certificate into my original order of September 17, 1958, and make it a part thereof.

JOHN W. McILVAINE
U. S. District Judge

Dated: September 26, 1958

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,766

HOWARD JAMISON, Administrator of the Estate of MARY G. CLARK, Deceased

v.

EDWIN S. KAMMERER and WALTER EDELEN

EDWIN S. KAMMERER, *Appellant*

No. 12,767

HOWARD JAMISON, Administrator of the Estate of THELMA J. GRAHAM, Deceased

v.

EDWIN S. KAMMERER and WALTER EDELEN

EDWIN S. KAMMERER, *Appellant*

No. 12,768

HOWARD JAMISON, Administrator of the Estate of ALFRED WILLIAM FALLON, Deceased

v.

PENNSYLVANIA RAILROAD COMPANY, ALLEGHENY COUNTY SANITARY AUTHORITY and UNITED FOUNDATION

UNITED FOUNDATION, *Appellant*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued December 1, 1958

Before BIGGS, *Chief Judge*, and MARIS, GOODRICH, MCLAUGHLIN, KALODNER, STALEY, and HASTIE, *Circuit Judges*.

Opinion of the Court

(Filed February 26, 1959)

PER CURIAM.

These appeals present the same isues as those decided today in Corabi v. Auto Racing Co. at our No. 12,760. We note that in thirty-three additional civil actions in the court below Mr. Jamison was named as administrator in order to create federal diversity jurisdiction. We observe also, as in the Corabi case, that the events complained of in these three suits occurred in Pennsylvania and the decedents were residents of Pennsylvania. If the situation presented requires a cure that cure in the present state of the law cannot come from this court. For the reasons stated in the Corabi opinion the judgments will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,760

SAMUEL A. CORABI, Administrator, d.b.n. of the Estate of HAROLD BRUNN, JR., Deceased

v.

AUTO. RACING, INC., a Pennsylvania Corporation and PINEGROVE SPEEDWAY, INC., a Pennsylvania Corporation, *Appellants*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued December 1, 1958

Before BIGGS, *Chief Judge*, and MARIS, GOODRICH, MCLAUGHLIN, KALODNER, STALEY, and HASTIE, *Circuit Judges*.

Opinion of the Court

(Filed February 26, 1959)

By BIGGS, *Chief Judge*.

The operative facts in this case are undisputed. Brunn, a minor twelve years old, lived with his mother in Allegheny County, Pennsylvania. He died as a result of injuries sustained on May 30, 1957, when a wheel detached from a July 16, 1957, the Register of Wills of Allegheny County Pennsylvania, went into the stands and struck him. On July 16, 1957, the Register of Wills of Allegheny County granted letters of administration to Brunn's mother. On May [illegible] 1958, Mrs. Brunn by petition to the Orphans' Court of Allegheny County asked leave to resign as

administratrix, stating: "It is the desire of your petitioner that an action be instituted to recover for the death of her son in the District Court of the United States for the Western District of Pennsylvania and herewith tenders her resignation as . . . administratrix in order that Letters of Administration may be granted to a non-resident for the purpose of such action."

The Orphans' Court granted Mrs. Brunn's petition and on May 21, 1958, the Register of Wills granted letters of administration, d.b.n., to Corabi, the plaintiff-appellee here, a resident of Steubenville, Ohio. The suit at bar was then instituted based on diversity of citizenship and the necessary jurisdictional amount. A motion was filed by the defendants, the appellants here, to dismiss the action on the ground that any diversity of citizenship which existed between the parties was "simulated" and "designed solely and collusively to create jurisdiction" in the court below. The motion was denied by that court, conceiving itself to be bound by the decisions of this court. Believing our rulings to be at variance with those of other Courts of Appeals,[1] the court below, concluding that there was a controlling question of law, certified this in an order pursuant to Section 1292(b), Title 28, U.S.C. By our order of October 27, 1958, we granted permission to appeal from the interlocutory order of the court below. This is the appeal before us.

The issue presented for our determination can be stated as follows: Whether the resignation or renunciation of a resident administratrix and the appointment of a non-resident administrator, d.b.n., for the express purpose of creating diversity of citizenship between the parties, was

[1] For an example see the decision of the Court of Appeals for the Eighth Circuit in Martineau v. City of St. Paul, 172 F. 2d 777 (1949). But cf. McCoy v. Blakeley, 217 F. 2d 227 (8 Cir. 1954). The Supreme Court of the United States has not ruled on this issue.

collusive and, therefore, in violation of Section 1359, Title 28, U.S.C. The statute provides: "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

We state first that insofar as any question of timeliness in respect to bringing the suit at bar is concerned the fact that Mrs. Brunn resigned as administratrix and Mr. Corabi was then designated as administrator d.b.n. is immaterial since the record shows that the suit was not commenced until after the appointment and qualification of the administrator d.b.n. It has been long settled that the plaintiff in a diversity suit must be entitled to bring it at the time the jurisdiction of the court attaches. See Chappedelaine v. Dechenaux, 8 U.S. (4 Cranch) 306, 308 (1808); Rule 17, Fed. R. Civ. Proc., 28 U.S.C.[2] This is a rule of procedure which governs actions such as that at bar in the United States district courts. In Fallat v. Gouran, 220 F.2d 325, 326 (1955), we held that where the suit was brought by a general guardian for a mentally incompetent individual appointed by the Court of Common Pleas of Montgomery County, Pennsylvania,[3] the fact the general guardian may not have been the real party in interest was immaterial for it was the citizenship of the general guardian which governed his right to bring and maintain the suit and the citizenship of the real party in interest was immaterial insofar as the purposes of diversity jurisdiction were concerned if the general guardian had the capacity to bring

[2] Rule 17(a) provides: "Every action shall be prosecuted in the name of the real party in interest, but an executor, [or] administrator . . . may sue in his own name without joining with him the party for whose benefit the action is brought. . . ."

[3] The appointment of the general guardian in Fallat was made pursuant to the Pennsylvania Incompetents' Estates Act of 1951, 50 P.S. Pa. §§ 1631-2041 (Supp. 1954).

and maintain the suit.[4] There can be no doubt in the case at bar that the administrator d.b.n. has the capacity to maintain the suit though, as was the case in Fallat, he may not be the real party in interest.[5]

We therefore have presented to us in pure form the issue of whether the institution of a suit such as that at bar by an administrator to secure federal jurisdiction is a violation of Section 1359, Title 28, U.S.C. In the terms of the statute was the administrator "improperly or collusively made" to invoke the jurisdiction of the court below? The earliest decision of this court, which has been cited to us or which we have been able to find, dealing with this question is Jaffe v. Philadelphia & Western R.R. Co., 180 F.2d 1010, 1011-1013 (1950).[6] In that case, relying on Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 189 (1931),[7] and pointing out that the Supreme Court had ruled that a state probate court decree could not be attacked collaterally in order to question the purpose behind it, this court held that diversity of citizenship had not been secured by collusion within the meaning of the federal

[4] The complaint in the case at bar declares on both survival and wrongful death actions.

As to a survival action, see 20 P.S. Pa. § 320.102 (1950), defining "Fiduciary" and "Personal representative" to include executor or administrator; 20 P.S. Pa. § 320.603 (1950), concerning action by or against personal representative.

As to a wrongful death action, see 12 P.S. Pa. §§ 1601, 1602 (1953), establishing the cause of action and permitting "personal representatives" to sue; Section 2201 Pa. Rules of Civ. Proc., 12 P.S. Pa. (Supp. 1958), defining "personal representative" to include "executor" or "administrator"; Section 2202 Pa. Rules of Civ. Proc., 12 P.S. Pa. (1951), further establishing that personal representatives may sue.

[5] See note to Rule 2002, Pa. Rules of Civ. Proc., 12 P.S. Pa., p. 442. See also Rule 17(a), Fed. R. Civ. Proc., 28 U.S.C.

[6] Compare Blumenthal v. Craig, 81 Fed. 320 (3 Cir. 1897).

[7] In the Mecom case the appointment of a Louisiana administrator as plaintiff prevented the removal of the case to the federal court.

statute and, in substance, that the motives for the appointment of a foreign administratrix were immaterial and would not be inquired into by the courts. We reiterated that view in substance in our Fallat decision in *note 2* cited to the text, 220 F.2d at p. 327.[8]

The defendants attach importance to the decision in Lehigh Mining & Manufacturing Co. v. Kelly, 64 Fed. 401, affirmed 160 U.S. 327 (1895). This decision of the Supreme Court requires discussion in relation to the case at bar. In the cited case the officers and stockholders of a Virginia corporation organized a Pennsylvania corporation "to create a case cognizable by the Circuit Court of the United States for the Western District of Virginia." The Virginia corporation passed to the Pennsylvania corporation without consideration "all of the right, title and interest" of the Virginia corporation but remained in existence. The stockholders of the two corporations were identical and Mr. Justice Harlan for the Supreme Court laid special emphasis on the fact that the Pennsylvania corporation if it succeeded in obtaining a judgment against the defendants could have been required by the stockholders of the Virginia corporation and by its own stockholders to reconvey the lands in controversy to the Virginia corporation without any consideration passing to the Pennsylvania corporation. The Supreme Court concluded that this was a fraud upon the Court and a device created to obtain and support diversity jurisdiction and was collusive and that Section 5 of the Act of March 3, 1875, 18 Stat. 470, the predecessor to present Section 1359 and substantially similar to it, required dismissal of the action. To like effect was the decision of Miller & Lux v. East Side Canal Co., 211 U.S. 293 (1908).

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[8] Such decisions of the Supreme Court as Coal Company v. Blatchford, 78 U.S. (11 Wall.) 172 (1870), and Chappedelaine v. Dechenaux, 8 U.S. (4 Cranch) 306 (1808), cited in Coal Company v. Blatchford, 78 U.S. (11 Wall.) at p. 175, are not directly helpful for Section 1359 or its predecessor was apparently not before the Supreme Court in these cases.

We would consider the decisions in Lehigh Mining and Miller & Lux as persuasive were it not for the later decision of the Supreme Court in Black and White Taxicab and Transfer Company v. Brown and Yellow Taxicab and Transfer Co., 276 U.S. 518 (1928). In this case the Supreme Court by Mr. Justice Butler said, 276 U.S. at p. 525: "It requires no discussion to distinguish *Lehigh Mining & Mfg. Co. v. Kelly* . . . , and *Miller & Lux v. East Side Canal Co.* . . . ." In the Taxicab Company case a Tennessee corporation had been created for the alleged fraudulent purpose of giving a United States district court jurisdiction and to evade the laws of Kentucky. Cf. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). Mr. Justice Butler stated: "Section 37 of the Judicial Code requires any suit commenced in a district court to be dismissed, if it shall appear that the suit does not really and substantially involve a dispute or controversy properly within its jurisdiction or that the parties have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable in such court. The requisite diversity of citizenship exists. And the controversy is real and substantial. The privilege granted is valuable. Petitioner treats the contract as invalid and claims to be entitled, without the consent of the railroad company to use railroad property to park its vehicles and solicit business. The railroad company has failed to protect the rights it granted. The motives which induced the creation of respondent to become successor to its Kentucky grantor and take a transfer of its property have no influence on the validity of the transactions which are the subject of the suit. The succession and transfer were actual, not feigned or merely colorable. In these circumstances, courts will not inquire into motives when deciding concerning their jurisdiction. *M'Donald v. Smalley, et al.*, 1 Pet. 620, 624. It is enough that respondent is the real party in interest. *Smith et al. v. Kernochen*, 7 How. 198, 216. The incorporation of respondent or its title to the business and contract in question is not impeached. Cooperation between it

and the railroad company to have the rights of the parties determined by a federal court was not improper or collusive within the meaning of § 37. . . . The district court had jurisdiction."

We cannot distinguish the facts of the Taxicab Company case in any practical way from those of the case at bar. In the instant case the controversy is real and substantial. Brunn's administratrix was discharged and the administrator d.b.n. was appointed prior to the inception of the suit, as we have already said. Unquestionably he possesses causes of action and is entitled to prosecute them for whatever they may be worth. By close reasoning the facts of the case at bar seem to fall outside of the ruling of the Lehigh Mining Co. case and within the ambit of the Taxicab Company case. In view of the ruling of the Supreme Court in the latter case we cannot hold that the appointment of the administrator d.b.n. was improper or collusive within the meaning of Section 1359.

There are other considerations. The statute uses the phrase "improperly or collusively" to characterize the manufacture or joinder prohibited by it. The word "collusion" is a strong one.[9] The term "collusion" indicates "A secret agreement and cooperation for a fraudulent or deceitful purpose; deceit; fraud." Webster's New International Dictionary, 2 ed. The same authority quotes Spenser, "The foxe, maister of *collusion*," and citing Bouvier goes on to state the meaning of the term at law as "An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law." Certainly to make use of state law to obtain diversity jurisdiction even though the object may be a high verdict in a federal court is not collusive within the ordinary meaning of that term. Moreover the word "collusion" generally is employed to indicate an

[9] See Cohan and Tate, "Manufacturing Federal Diversity Jurisdiction by the Appointment of Representatives: Its Legality and Propriety", 1 Villanova Law Review 201, 245-247 (1956).

illegal agreement or understanding between opposing sides of a litigation rather than to an arrangement effected by one side of the sort at bar. Here the plaintiff's side of the case acted for what it deemed to be its own benefit and was opposed heartily by the other party to the litigation. The terms "improper" or "improperly", according to Webster, mean "Not suited to the circumstances, design, or end; not appropriate, fit, or congruous; as, an *improper* medicine; *improper* dress." Webster gives as synonyms: "Improper, indecent, unseemly, indecorous, unbecoming, indelicate." The word "improperly" clearly connotes impropriety. We cannot perceive that here. Had Congress intended to prohibit the creation of federal diversity jurisdiction under such circumstances as those at bar it could have done so simply by omitting the words "improperly or collusively".

We conclude that the arrangement here made is not within the reach of Section 1359.[10] If what we deem to be

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[10] The following cases seem to support the views expressed in this opinion: Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928); Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183 (1931); Chicago v. Mills, 204 U.S. 321 (1907); Blair v. Chicago, 201 U.S. 400 (1906); Mexican Central Railway Co. v. Eckman, 187 U.S. 429 (1903); City of New Orleans v. Gaines's Adm., 138 U.S. 595 (1891); Manhattan Life Ins. Co. v. Broughton, 109 U.S. 121 (1883); Fallat v. Gouran, 220 F. 2d 325 (3 Cir. 1955); McCoy v. Blakely, 217 F. 2d 227 (8 Cir. 1954); Jaffe v. Philadelphia & Western R.R. Co., 180 F. 2d 1010 (3 Cir. 1950); Kentucky Natural Gas Corp. v. Duggins, 165 F. 2d 1011 (6 Cir. 1948); Curb and Gutter District No. 37 v. Parrish, 110 F. 2d 902, 906 (8 Cir. 1940); Harrison v. Love, 81 F. 2d 115 (6 Cir. 1936); City of Detroit v. Blanchfield, 13 F. 2d 13 (6 Cir. 1926); O'Neil v. Wolcott Minn. Co., 174 Fed. 527 (8 Cir. 1909); Goff's Admr. v. Norfolk & W.R. Co., 36 Fed. 299 (C.C.W.D. Va. 1888); Hopkins v. Pa. Power and Light Co., 112 F. Supp. 136 (E.D. Pa. 1953); Wertz Estate (No. 1), 6 D & C 2d 429 (1955); Lichtenwalner v. Pa. Power and Light Co., 86 D & C 231 (1953); Fike Estate, 80 D & C 322 (1951).

The three following cases seem to support a contrary view: Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327 (1895); Martineau v. City of St. Paul, 172 F. 2d 777 (8 Cir. 1949); Cerri v. Akron-Peoples Telephone Co., 219 Fed. 285 (N.D. Ohio 1914).

the law is to be changed we think that it would be improper for that change to emanate from this court.

The judgment appealed from will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

IN THE ORPHANS' COURT OF CLEARFIELD COUNTY, PENNSYLVANIA

In Re: Estate of

Thelma J. Graham

Opinion

Appeal from decision of Register of Wills of Clearfield County refusing to revoke Letters of Administration.

Thelma J. Graham died intestate on February 2, 1957, aged eighteen, as a result of an automobile accident occurring on or about that date.

Decedent was a school girl and is survived by her parents as her sole heirs.

On March 23, 1957 the parents of the deceased joined in a renunciation of their right of administration of the estate of decedent and requested the Register of Wills of Clearfield County to appoint one Howard Jamison of Brewster, Ohio.

Bond in the sum of $1000.00 was filed and accepted by the Register, and Letters of Administration were duly issued.

Following the issuance of the Letters, the Administrator instituted civil action in the Federal District Court for the

Western District of Pennsylvania against Edwin Kammerer, for damages consequent upon the death of Thelma J. Graham, alleged to have been caused by a negligent act or acts of said Edwin Kammerer.

On the 8th day of May 1957, said Edwin Kammerer petitioned the Register of Wills of Clearfield County to revoke the Letters of Administration issued to Howard Jamison, alleging Howard Jamison is a professional administrator, presently administering twenty-one estates in the Commonwealth of Pennsylvania, all involving actions for the wrongful death of the decedents; that said Howard Jamison petitioned for letters of administration on this estate for the sole purpose of depriving the Court of Common Pleas of Clearfield County of Jurisdiction of the action; that the parents of the said decedent, her sole heirs, are able to serve as administrators, and that the petitioner, Edwin Kammerer, would be deprived of the right to have his case tried before a jury of citizens of Clearfield County or Centre County.

A rule was issued by the Register of Wills, and testimony thereon was taken June 25, 1957.

This testimony disclosed that the parents of the decedent did not know Howard Jamison until after the date of their daughter's death, and relying upon the advice of counsel, feeling they would rather have someone else administer the estate, and in pursuance of this waived their right to administration, and requested the appointment of Howard Jamison. They testified they voluntarily relinquished such right, and made such request of their own free will.

At the same hearing, a record of twenty-one death actions in which Howard Jamison appeared as administrator was offered, and placed in the record.

At a subsequent date, not given, the Register of Wills refused to revoke Letters issued March 23rd to Howard

Jamison, and from this order Edwin Kammerer has appealed to the Orphans' Court.

Counsel for Administrator and for Edwin Kammerer submitted the matter on briefs and waived argument.

Section 301 of the Act of April 18, 1949, P. L. 512 (20 PS 323.01) provides that letters testamentary or of administration of an estate of a decedent domiciled in the Commonwealth at the time of his death, shall be issued in the county where the decedent had his family or last principal residence. In this instance, decedent was a resident of Clearfield County.

Section 305 (20 PS 323.05) subsection (b), provides that letters of administration shall be granted by the register in such form as the case shall require, to one or more of those thereinafter mentioned, and except for good cause in the prescribed order. In the present instance, the only concern is with clause (3) under this subsection, which reads as follows:

> "Those entitled under the intestate law as the register, in his discretion, shall judge will best administer the estate, giving preference, however, according to the sizes of the shares of those in this class." (Emphasis supplied)

The decedent, Thelma J. Graham, died intestate, and her parents are the only persons who are entitled to her estate under the intestate laws.

Clause (6) of the same subsection then provides:

> "If anyone of the foregoing shall renounce his right to letters of administration, the register, *in his discretion*, may appoint a nominee of the persons so renouncing in preference to the persons set forth in any succeeding clause." (Emphasis supplied)

The register under the powers vested in him by the two foregoing portions of the Fiduciaries Act of 1949, in hon-

oring the petition of the parents of the deceased girl and their waiver of their right to letters of administration, with their request to appoint Howard Jamison administrator, made such appointment. It cannot be questioned that the Register in thus making the appointment, exercised his discretionary powers, and in so acting, performed a judicial act, which cannot be disturbed by the Orphans' Court upon appeal. McMURRAY'S ESTATE, 256 Pa. 233.

In a case closely analogous to the instant case, WERTZ ESTATE (No. 1), 6 D & C 24, 429, the situation presented here, was discussed at length. After a lengthy review of the law in Pennsylvania in this respect, it was concluded that the appointment of an out of state administrator, upon the waiver of their right, by those entitled to letters, and their request to appoint the administrator, the act of the register in honoring the said waiver and request, could not be set aside by the Orphans' Court. It would be vain repetition to again set forth the opinion in WERTZ APPEAL which impresses this Court as being soundly reasoned and properly expressing the law on the point.

Had the Register at the inception of this matter refused to grant letters to Howard Jamison, under the circumstances, an appeal from that refusal would not be sustained. It may be that Howard Jamison is a professional administrator, but that would not amount to a fraud upon the Register in obtaining Letters, nor does it fall within the powers granted the Orphans' Court to set aside or remove an administrator or executor. The present appeal does not invoke the powers of the Orphans' Court, nor set up any of the necessary allegations which would give the Orphans' Court power to remove the administrator.

The reasoning in WERTZ ESTATE, supra, as well as in McMURRAY'S ESTATE, supra, indicate that those who are to receive the estate of an intestate, are the real parties in interest, and in the absence of any fraud upon them, or fraud upon the register, they should have the right to de-

termine what is their best interests in the handling of the estate.

The petitioner in this instance, who may become a debtor to the estate, is of all persons the least qualified to object to the appointment of an administrator. The two cases cited by the appellant, SHARPE'S APPEAL, 87 Pa. 163, and FRICK'S APPEAL, 114 Pa. 29, are clear indications of the dangers forestalled by those decisions, inherent in permitting any person to become an administrator beyond those who have a direct interest in the estate of a decedent, particularly in the size of such estate.

Order

Now, March 14, 1958, appeal from refusal of the Register of Wills of Clearfield County to remove Howard Jamison as Administrator of the Estate of Thelma J. Graham is dismissed. Costs to be paid by appellant.

BY THE COURT,

.....
President Judge

APPENDIX C

Appeal from the United States District Court for the District of Minnesota; Dennis F. Donovan, Judge.

Action by Robert J. Martineau as guardian of Daniel Joseph Murphy, a minor, against the City of St. Paul and others, for injuries resulting from negligence. From a judgment dismissing the complaint for lack of jurisdiction, 78 F. Supp. 892, plaintiff appeals.

Affirmed.

William H. De Parcq, of Minneapolis, Minn. (Joseph P. Johnson, of St. Paul, Minn., and Donald T. Barbeau, of Minneapolis, Minn., on the brief), for appellant.

Marshall F. Hurley, Asst. Corp. Counsel of City of Saint Paul, of St. Paul, Minn. (Bruce J. Broady, Corp. Counsel, of St. Paul, Minn., on the brief), for appellee City of Saint Paul.

Pierce Butler, III, of St. Paul, Minn. (Michael J. Doherty, Jack C. Foote and Doherty, Rumble, Butler & Mitchell all of St. Paul, Minn., on the brief), for appellees Francis D. Butler and Pierce Butler.

Before SANBORN, WOODROUGH, and THOMAS, Circuit Judges.

SANBORN, Circuit Judge.

This is an appeal from a judgment dismissing the complaint of the plaintiff (appellant) for lack of jurisdiction. The action is one to recover damages of $100,000 for personal injuries alleged to have been sustained by Daniel Joseph Murphy, a minor, as a result of the negligence of the defendants (appellees). The minor, his parents, and the defendants are all citizens of Minnesota. The plaintiff, Robert J. Martineau, who is the general guardian of the minor, is a citizen of Illinois. The accident which caused the injuries to the minor occurred in St. Paul, Minnesota, on July 22, 1947, when he threw some dynamite caps into a bonfire. The caps, according to the complaint, were negligently left by the Northern States Contracting Company and the individual defendants in a dilapidated building or shed constituting a nuisance attractive to children and located partly upon property belonging to the McDermott Realty Company and partly upon a public street of the City of Saint Paul, Minnesota.

James Vincent Murphy, the father of the minor, as his natural guardian, presented to the City of Saint Paul a claim on behalf of the minor for $250,000 damages. On February 13, 1948, the parents of the minor filed a petition with the Probate Court of Ramsey County, Minnesota, alleging "that a general guardian should be appointed for the purpose of protecting the person and estate of said

minor by prosecuting an action for personal injuries sustained by said minor," and that Robert J. Martineau, a lawyer of Wilmette, Illinois, was a suitable person to be appointed such guardian. The prayer of the petition was that he or some other suitable person be appointed "general guardian" of the person and estate of said minor." The Probate Court, on Febrtuary 13, 1948, appointed Robert J. Martineau "general guardian of the person and estate" of the minor. Letters of general guardianship were issued to Martineau on February 25, 1948.[1]

Robert J. Martineau brought this action in the United States District Court for the District of Minnesota in his own name upon the assumption that he had the right to do so by virtue of § 540.04, Minn. Stat. Ann., which provides: "An executor, administrator, or guardian, a trustee of an express trust, or a person expressly authorized by statute to sue, may sue without joining with him the person for whose benefit the action is brought. * * *"

Martineau, in basing jurisdiction of this action upon diversity of citizenship, relied upon the rule announced by the Supreme Court of the United States in Mexican Central Railway Co. v. Eckman, 187 U.S. 429, in which the court said at page 434, 23 S. Ct. 211, 213, 47 L. Ed. 245: "If in the state of the forum the general guardian has the right to bring suit in his own name as such guardian, and does so, he is to be treated as the party plaintiff so far as Federal jurisdiction is concerned, even though suit might have been instituted in the name of the ward by guardian ad litem or next friend."

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[1] The appointment of a nonresident guardian was contrary to Rule XX of the Minnesota Probate Court Rules, promulgated by the Judges of the Probate Courts of Minnesota under § 525.06, Minn. Stat. Ann., providing that "No nonresident of the State of Minnesota shall be appointed representative of the estate of a deceased person or guardian of the estate or person of any ward," page 889 of Vol. 31, Minn. Stat. Ann., but it is not contended that the Probate Court of Ramsey County was without power to make the appointment.

See also, Mecom v. Fitzsimmons Drilling Co., Inc., 284 U.S. 183, 52 S. Ct. 84, 76 L. Ed. 233, 77 A.L.R. 904; City of Detroit, Mich. v. Blanchfield, 6 Cir., 13 F. 2d 13, 47 A.L.R. 314.

Several of the defendants made motions to dismiss, in which it was asserted that the appointment of Martineau was collusive and that the requisite diversity of citizenship did not exist. The District Court concluded that, under the applicable Minnesota law and the circumstances of the case, the minor ward was the real party plaintiff; that Martineau was a nominal plaintiff, selected for the sole purpose of attempting to confer jurisdiction upon the federal court; and that the court had no jurisdiction. 78 F. Supp. 892.

No one is under any illusions as to the appointment of a citizen of Illinois as guardian for the injured minor having been procured for the purpose of conferring jurisdiction of this case upon the federal court. Counsel for the plaintiff regards this as legitimate and effective strategy, while counsel for the defendants consider it an improper, collusive and ineffective device to confer upon the federal court a jurisdiction which it does not actually possess. We think that the question of federal jurisdiction must largely turn upon the relationship which Martineau and his ward bear to this controversy under Minnesota law.

Our examination of the applicable law of Minnesota leads us to the following conclusions:

[1] (1) The minor is a ward of the Minnesota Probate Court.[2]

[2] (2) The guardian is merely an officer or agent of the Probate Court.[3]

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[2] Cox v. Marvel, 56 Minn. 358, 362, 57 N.W. 1062, 1063.

[3] Perine v. Grand Lodge of A. O. U. W., 48 Minn. 82, 87, 50 N.W. 1022, 1023; Kurtz v. St. Paul & Duluth R. Co., 48 Minn. 339, 342, 51 N.W. 221, 31 Ann. St. Rep. 657; Cox v. Marvel, supra, page 363 of 56 Minn., page 1063 of 57 N.W.; State ex rel. Hilbert (State Board of Control) v. Probate Court of Mahnomen County, 150 Minn. 16, 22, 184 N.W. 27, 29, 30; Hoverson v. Hoverson, 216 Minn. 237, 241, 12 N.W. 2d 497, 500; Vadnais v. State, 224 Minn. 439, 442, 28 N.W. 2d 694, 696.

[3] (3) The guardian has no estate or personal interest in the property or claim of his ward.[4]

[4] (4) The minor is the real party in interest. The guardian is a proper party to the record and has control of the prosecution of the action. The name of the minor may, and should be, inserted as plaintiff.[5]

[5] (5) Since the minor is the owner of the claim in suit and the real party in interest, the action should have been brought in his name, and the title should be amended to show that he is the actual plaintiff, even though that is not expressly required by statute, Johnson v. Colp, 211 Minn. 245, 248, 249, 300 N.W. 791, 793.[6]

[6, 7] (6) Since the plaintiff could not maintain this action in the state courts of Minnesota in his own name, he cannot maintain it in the federal court, which, in diversity cases, enforces State law and State policy.[7]

The proper title of this action is, "Daniel Joseph Murphy, a minor, by Robert J. Martineau, his general

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[4] Humphrey v. Buisson, 19 Minn. 221, 225; Perine v. Grand Lodge of A. O. U. W., supra, page 87 of 48 Minn., page 1022 of 50 N.W.; Kurtz v. St. Paul & Duluth R. Co., supra, page 342 of 48 Minn., page 221 of 51 N.W.; Hoverson v. Hoverson, supra, page 241 of 216 Minn., page 500 of 12 N.W. 2d; Martin v. First National Bank of Rush City, D.C. Minn., 51 F. 2d 840, 844, 845; Johnson v. United States, 8 Cir., 87 F. 2d 940, 943, 109 A.L.R. 949.

[5] Perine v. Grand Lodge of A. O. U. W., supra, pages 87-88 of 48 Minn., page 1023 of 50 N.W.

[6] Perine v. Grand Lodge of A. O. U. W., supra, page 87 of 48 Minn., pages 1022, 1023 of 50 N.W.; Lund v. Springsteel, 187 Minn. 577, 578, 246 N.W. 116; Gimmestad v. Rose Brothers Co., Inc., 194 Minn. 531, 537, 261 N.W. 194, 196; Johnson v. Colp, 211 Minn. 245, 248, 249, 300 N.W. 791, 793; Parrish v. Peoples, 214 Minn. 589, 597, 9 N.W. 2d 225, 229, 230; Hoverson v. Hoverson, supra, p. 239 of 216 Minn., p. 499 of 12 N.W. 2d; Rebne v. Rebne, 216 Minn. 379, 383, 13 N.W. 2d 18, 20; Sanne v. Metropolitan Life Ins. Co., 218 Minn. 181, 182, 15 N.W. 2d 524, 525.

[7] Angel v. Bullington, 330 U.S. 183, 191, 67 S. Ct. 657, 91 L. Ed. 832.

guardian, Plaintiff, versus" the defendants. As so amended, the title discloses what is the fact, namely, that the actual controversy is between citizens of Minnesota, and that the diversity of citizenship requisite for federal jurisdiction is lacking.[8]

[8] Even if this controversy were to be regarded as one between the guardian and the defendants, we would still be of the opinion that diversity of citizenship was lacking, since the guardian is a mere agent of the Probate Court of Ramsey County, Minnesota, appointed for the purpose of enforcing a claim of a ward of that court against citizens of Minnesota. We think that a Probate Court of Minnesota, by appointing a nonresident as a guardian for a Minnesota minor, cannot transmute what is purely a local controversy into one between citizens of different states, or confer jurisdiction of the controversy upon the United States District Court for the District of Minnesota.

The judgment appealed from is affirmed.

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[8] Counsel for the minor have already brought an action in the State District Court of Ramsey County, Minnesota, against the same defendants, upon the same claim. The action is entitled: "Daniel Joseph Murphy, a minor, appearing by Robert J. Martineau, his general guardian, and by James V. Murphy, his father and natural guardian, Plaintiff," versus the defendants. While counsel for the appellant asserts that this state court action was brought as a precautionary measure, its title recognizes that, under the law and public policy of the State of Minnesota, an action on behalf of a ward by a guardian, whether he is a natural guardian, a guardian ad litem, or a general guardian, should be brought in the name of the ward.